SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1927.

N. & G. Taylor Company, Inc., Petitioner,
vs.
John A. Anderson and C. A. Gustafson.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 3, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

N. & G. Taylor Company, a partnership composed of Taylor and Justice, had long been engaged in the manufacture of tin plate. November 1, 1916, respondents and that partnership entered into a contract by which the former agreed to furnish, in fairly equal monthly quantities, and the latter agreed to take and pay for the fuel oil required by it, estimated at 1,200,000 gallons, for the eight months ending June 30, 1917. On January 31, 1917, the partners caused petitioner to be organized, giving it the name of the partnership with the word "Incorporated" added. As of February 1, 1917, the corporation assumed the liabilities of the partnership and took over all its property and has since carried on the business.

The petitioner commenced this action in the northern district of Illinois, eastern division, March 7, 1918. The declaration alleged an agreement between respondents and petitioner for the delivery of the oil, a breach by respondents, and resulting damage. No reference was made to the partnership, the contract between it and respondents, the subsequent creation of petitioner or its acquisition of the business. At the trial in May, 1924, petitioner by leave of court filed an amended declaration alleging that respondents and the partnership made an agreement for the oil in question; that on February 1, 1917, petitioner became the owner of all the assets of the firm including the agreement and all rights appertaining to it; that respondents failed and refused to deliver the oil either prior to February 1, 1917, to the partnership or afterwards to the petitioner—except approximately 40,000 gallons which was delivered to the partnership—and that thereby

petitioner itself and as successor of the firm was subjected to great loss. Section 18 of the Illinois Practice Act (c. 110, Cahill's Revised Statutes, 1927) provides that the assignee of any chose in action not negotiable may sue thereon in his own name, "and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title . . . ." In order to comply with that provision, the petitioner filed the affidavit of its president stating that on February 1, 1917, it took over the partnership assets including the contract and a right of action against respondents for its breach from the time it went into force to January 31, 1917.

Respondents, by plea to the amended declaration, set up a statute of Illinois (Revised Statutes, c. 83, § 20) declaring that, when a cause of action has arisen in another State "and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State," and one of Pennsylvania (§ 13,857 Pennsylvania Statutes) providing that actions on contracts must be commenced within six years from the time the right of action accrued; and alleged that the cause of action arose in Pennsylvania more than six years before the filing of the amended declaration and was barred by the laws of both States. The trial court held that the amended declaration stated a new cause of action and that it was barred, directed a verdict and gave judgment for the respondents. The Circuit Court of Appeals affirmed. 14 F. (2d) 333. This Court granted a writ of certiorari. 273 U. S. 681.

Section 18 of the Illinois Practice Act will be applied in the courts of the United States sitting in that State. R. S. § 914. *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 488. In the absence of such a provision an assignee of a non-negotiable chose in action could not sue in his own name. *Glenn* v. *Marbury*, 145 U. S. 499, 509. The advantage conferred is taken subject to the terms specified, and the assignee must make the required showing in respect of ownership and source of title. It is established by the decisions of the Supreme Court of Illinois that in an action under that section a declaration that does not state that plaintiff is the actual bona fide owner thereof and set forth how and when he acquired title fails to state a cause of action. And it is also held that a cause of action set forth in a declaration

amended to comply with that section is barred if the period fixed by the statute of limitations has expired when the amended pleading is filed. Applying the state law, it must be held that the amended declaration set up a new cause of action which was then barred. *Gallagher* v. *Schmidt*, 313 Ill. 40; *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444.

Petitioner invokes R. S. § 954 providing that any court of the United States may at any time permit either of the parties to amend any defect in the pleadings upon such conditions as it shall in its discretion and by its rules prescribe. And it contends that federal courts allow such amendments independently of state enactments and decisions, and that here the amended declaration complied with § 18 of the Illinois Act, but stated no new cause of action.

Section 954 governs amendments and is to be liberally construed. *Norton* v. *Larney*, 266 U. S. 511, 516, and cases cited. But the propriety of the filing of the amended declaration is not involved as permission was granted on the application of the petitioner. The substance of the change is to be regarded. In any view, a new cause of action was brought in more than six years after it accrued. The original declaration alleged an agreement between respondents and petitioner and set it out in *haec verba*. It was a letter dated November 1, 1916, addressed to "N. & G. Taylor Company" and signed by respondents. The words "Accepted: N. & G. Taylor Co." appeared at the end of the letter. That declaration did not attempt to state a cause of action under § 18 of the state Practice Act. Petitioner did not sue or claim as assignee. No reference was made to the contract between respondents and the partnership. The cause of action there stated never existed. The amended declaration states a cause of action for breach of the contract that was made by the partnership. It cannot be treated as curing a defective statement of a cause of action theretofore attempted to be set up. Cf. *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 222. The change was not merely one of form; the fundamental substance of the claim was different. Cf. *Friederichsen* v. *Renard*, 247 U. S. 207, 213. It is clear that the amended declaration substituted a new cause of action. Petitioner cites and relies on *Mo., Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570. But that case does not support its contention. There the amendment, allowed after the expiration of the period prescribed by the statute of limi-

tations, related to form and not to the substance of the cause of action. The court said (p. 576): "It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit".

And it is plain that six years had expired when the amended declaration was filed. Respondents were in default when petitioner took over the business February 1, 1917. That appears from the allegations of the amended declaration as well as from the supporting affidavit. The contract covered fuel oil required in a period ending June 30, 1917. The action was commenced March 7, 1918; the cause of action had then accrued. The amended declaration was filed May 14, 1924, more than six years after the action was commenced. It cannot be deemed to relate back as it brought in a new cause of action, which must be treated as commenced at the time the amended declaration was filed. *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296, *et seq; Salyers* v. *United States*, 257 Fed. 255, 259.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.